UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

STATUS CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, February 12, 2014
10:01 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

APPEARANCES:

OFFICE OF THE UNITED STATES ATTORNEY
By: Aloke Chakravarty and Nadine Pellegrini,
Assistant U.S. Attorneys
John Joseph Moakley Federal Courthouse
Suite 9200
Boston, Massachusetts 02210
On Behalf of the Government

FEDERAL PUBLIC DEFENDER OFFICE
By: Miriam Conrad, Esq.
Timothy G. Watkins, Esq.
William W. Fick, Esq.
51 Sleeper Street
Fifth Floor
Boston, Massachusetts 02210
- and -
CLARKE & RICE, APC
By: Judy Clarke, Esq.
1010 Second Avenue
Suite 1800
San Diego, California 92101
On Behalf of the Defendant

P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 10:01 a.m.)

THE CLERK: United States District Court for the District of Massachusetts. Court is in session. Be seated.

For a status conference in the case of United States versus Dzhokhar Tsarnaev, 13-10200. Will counsel identify yourselves for the record, please.

MR. CHAKRAVARTY: Good morning, your Honor. For the government, Assistant U.S. Attorney Aloke Chakravarty.

MS. PELLEGRINI: Nadine Pellegrini for the United States.

MR. CHAKRAVARTY: And Mr. Weinreb is en route and may join us during the hearing.

THE COURT: Okay.

MS. CLARKE: Judy Clarke, Miriam Conrad, Tim Watkins and Bill Fick on behalf of Mr. Tsarnaev, whose presence has been waived.

THE COURT: All right. Good morning. Thank you for your status report -- your joint status report. I appreciate it.

I think it is appropriate to do some scheduling. You both, in the status report, suggested an outline of what you think the schedule should be. I have to say that by and large, with some exceptions, I think the government's suggestion is

the more reasonable of the two. And so I will set the trial date for November 3rd, 2014. I do that because the other dates will obviously be set in reference to that date. And so I think the first is for discovery motions.

Now, I understand from the report that there are some outstanding discovery issues to be resolved, perhaps by negotiation and, if not, by motion. I think the date that the government suggested for any motions for the present discovery disputes is an appropriate one, which is March 12th. By setting that, I don't preclude the possibility that if there are further discovery disputes, we can address them as necessary. So that's not necessarily a final deadline for all discovery if there are other issues that arise after that, but I think that's an appropriate date.

And basically I adopt the government's three suggestions for the timetable for this spring, which would be motions to suppress evidence by April 9th, and then I think as a sort of catch-all date of May 7th for all other motions of, I guess, addressing legal issues, is the way to put it. I won't try to circumscribe them by cataloging, but I think you get the idea. The discovery is kind of a category, and any evidence suppression is, and then whatever other legal issues, except venue, are to be filed by May 7th.

As to the venue issue, I think we can delay on that a little bit, and I think a deadline of June 11th is an

appropriate time for a venue motion. I will permit it to be resolved, if there is one, during the summer, in advance of the need to summon jurors for a November trial.

I suggest a status conference on June 11th. We will probably see each other between now and then on motion hearings, but I don't think we should leave without at least a status date set in the record as a continuance date. So that may or may not be adjusted.

I want to have a discussion with you about the expert disclosures before we talk about scheduling those. And so finally, the other final date that I think we can put down in light of the November 3rd -- by that I mean that will be when empanelment would begin, on November 3rd. Obviously, we're going to take some time with empanelment. So evidence presentation would begin sometime thereafter, whatever that may be as we work toward it. But a final pretrial two weeks before the beginning of evidence -- I'm sorry -- jury selection would make the pretrial date October 20th, and I would say ten o'clock in the morning on October 20th.

So that's the calendar. I think it is a realistic and a fair one. I will say to both sides that this is undoubtedly going to be a lengthy trial, but you should keep in mind that not everything that can be presented for either side needs to be presented necessarily. There are interests of justice that can help you make those selections. In my experience it's not

uncommon for people in cases such as this, although this is a unique case, obviously, to seek to do everything they can conceivably do. That goes for both the prosecution and the defense. And I foresee a role for Rule 403 in the actual presentation of the evidence to avoid unnecessary cumulation of even relevant evidence. Just a general observation.

Now, I thought we might, if you wanted to, talk briefly about current discovery issues just to let me know what the nature might be. I don't know who wants to...

MR. CHAKRAVARTY: With the understanding that there may be a dispute, the defense has given us three discovery letters. We've responded to the first one essentially recently, and we have not yet responded to the remainder of the discovery letters which were filed -- which were given to us in the past week or so.

The defense has had an opportunity to view a large volume of exhibits that are actual physical evidence. They have received on the order of six to seven terabytes' worth of digital evidence; they have had access to the entire sum of relevant evidence as the FBI recognizes it to be. We've given them an exhibit list and said, you know, "This is what we have. If you want to see something, let us know and we'll make it available."

There are a few categories of evidence which are not physically here; for example, items that are down at the FBI

lab in Quantico. They include items as small, but individually marked, as a ball-bearing, a BB that may have been found in the street, all the way to components of the devices that exploded on April 15, 2014 -- 2013. Excuse me.

There are approximately 2,000 in number of those individualized exhibits which the defense has not yet had an opportunity to physically examine. They are available. They can be made available if -- our hope, for logistics purposes and, frankly, expense, is to have those materials come back to the Boston area for more facile viewing. We don't know what the time schedule is for that.

But in the interim, in addition to viewing evidence at the FBI, there are some other locations locally where there are larger exhibits, shall we say, vehicles, other large bulky exhibits, which we've made arrangements to have scheduled viewings for into -- for the next three or four weeks into the first week of March for which they will be able to inspect.

We have taken an additional step to index what we have produced in discovery. We've provided courtesy copies of a number of the digital exhibits and other pieces of evidence which may or may not be relevant but are -- it's more convenient, frankly, for both counsel, as well as ourselves, to provide them to defense as opposed to have them come view them somewhere. And to the extent that there has been an exchange if they've wanted to see something more, we're certainly

receptive to that. We haven't responded to the latest requests after they have viewed some 1,500 or so exhibits at the FBI. And we'll work through that and, obviously, if we refuse to produce some of that material, then the defense can file a motion.

One of the difficulties in responding to the defense requests is that they are not asking regularly for specific pieces of evidence, but rather, as an example, the way that certain evidence was gathered, they're seeking kind of production of any materials gathered in a specific way, which is not necessarily conducive to us responding to, as a matter of saying, "This is what we obtained through a certain technique."

Those types of -- this is just an insight as to some of the issues that we're having in terms of how we're going to respond to the defense. But, in sum, what we have that is relevant to either the liability phase or the penalty phase we have made available to the defense. We'll continue to do so, and we'll continue to provide courtesy copies to the extent that we can.

In some cases the defense, for the understandable reason of not wanting to tip their defense strategy to the government, has sought a filter team to make photocopies of things that they particularly spent their energies focused on. Understandable. We're accommodating that. But that does

provide an additional time lapse between when they inspect something, when that process is completed, and when those copies of physical evidence that they may have inspected can be made available.

But we're -- I say that to emphasize that there are -- we're going above and beyond what we probably need to do in order to make that information available to them. We want them to obviously be well prepared for the trial whenever it is. That's our assessment of discovery.

THE COURT: Well, just a moment. On the last point, the government's cooperation will facilitate adhering to the schedule that we've set. And if it becomes too difficult, the government's preferred trial date may be in jeopardy. I don't encourage that because it's my preferred trial date in the public interest, but I just caution the government that disagreements could endanger the schedule.

MR. CHAKRAVARTY: We understand that, your Honor. Thank you.

THE COURT: Ms. Clarke?

MS. CLARKE: I think that we have a slightly different view of where the discovery sits. We scheduled the week of January 13th to review physical evidence. We were told shortly before that date, "Okay. You have to let us know which scenes you want to look at," and we scrambled around to do that. We had said we want to look at the list of physical evidence that

had been seized.

So we did that and we provided that, and we went over to the FBI. And some six to eight hundred items were available for our review. There were a number of items we were told were at two different locations and we would have to reschedule dates to go out and do that, and we did that onsite. And we just yesterday, I think, got confirmation from the government that one of those sites is set up on the dates that we've asked for.

So we've had a little bit of a sluggish, shall I say, start to reviewing physical evidence and not due to our recalcitrance. We were told some 1,500 items were at the FBI lab in Quantico. When we were sharing drafts of the status report, we were then told there were some 2,000 items. And I don't think, with all due respect to the prosecutor, that those are all BB's from the list of items that we were ultimately shown when we did that January 13th review.

At the pace of some six to eight hundred items in a full week, an additional 2,000 items will take some time unless they are all, indeed, BB's. What that tells me, though, is the 2,000 items that are being evaluated are going to generate some more reports of the examination and tests, which also is a burden on us to figure out what to do with that.

I mean, the process is this: We set up a time to review some physical evidence, we go and review, we look at it

and determine whether we want a copy of it. And some of that could be paper copies, photocopies; some of it could be digital items. There are a whole host of digital items that are pending copying.

We left that review the week of the 13th with a list given to the FBI. And it's not a matter of courtesy, it's a matter of case law, that the prosecution team is not supposed to see what the defense is interested in copying. And the prosecution said, "Okay. We'll have the FBI copy it."

We were advised just a couple of days ago that the prosecution hadn't cleared the chain-of-custody waiver letter that we had sent some many, many days ago. So it's not the defense dragging its feet; it's we're really struggling with getting access to information. With 2,000 items in Washington, D.C., automatic discovery simply is not near complete.

But what we do is we go through it; we make a determination of needing copies of it, which we haven't gotten any of; we then have to analyze it and decide how much of that needs to be investigated and then how much of that needs to be seen by experts. I doubt we'll get experts access to information before the summer, which makes a trial date in November virtually impossible.

Discovery has been a laborious process, and in my experience, way outside the norm. It is perplexing to all of us why prosecutors would tack as close as they have to the wind

and not just produce. Disputes about, "You asked for X but you haven't narrowed your request. Please narrow your request." We narrow it, and then we're told that's not sufficient, or we're asked for different information. It's just a laboriously slow, cumbersome process.

And we thought asking for a May discovery motion date was fairly aggressive given the sluggishness and the resistance that we've received to the production of discovery. It's one thing to say we've got six to seven terabytes of information; it's another thing to say are we getting the information that is important to us. So it's a real problem.

And I have to say, Judge, I understand the Court's desire to move a trial date along, but the litigation schedule that the government set out and that the Court had adopted will be impossible for us to meet. We simply know enough about our case to know what we don't know. We have, as the Court knows, a tremendous amount of family history investigation to do, and that's halfway around the globe, with a number of logistical challenges involved, not the least of which is weather, Olympics, travel. There's just a tremendous amount of logistical hurdles in our way to make the trial date that the Court has suggested.

I'm not sure how we're going to make any of the litigation dates. We can certainly file motions for discovery by March 12th, but it will be piecemeal, because we are in the

laborious process of trying to work out on an informal basis with the prosecution --

Ms. Conrad cannot help herself.

THE COURT: There is precedent for that.

(Laughter.)

MS. CONRAD: I just want to -- just a couple of quick examples on this discovery issue, your Honor. Because -- and I just want to speak to this because of the local rule.

As the local rule -- under the local rule the government is supposed to respond to a discovery letter request within two weeks, and then two weeks later the defense files a motion. We sent a discovery letter to the government on December 9th. On December 18th we got an email saying, "We'll get back to you after the holidays. We're reviewing your request." Well, I thought the holidays were Christmas and New Year's. Apparently, they included Martin Luther King Day as well, because we didn't get a response until February 7th, nearly two months.

And in that response the government said with respect to -- "What's your support for this request?" You know, we have telephones. We have emails. If they want us to clarify one of our requests, they could contact us. Instead, we got radio silence from December 18th until February 7th.

Now, with that kind of response date, I don't know how we can file discovery motions by March. And with that kind of

response, I don't know how we can possibly move forward.

And the other thing I just want to say is I still haven't heard the government tell us when those 2,000 items at the lab are going to be available for our review. If they're at the lab, they're not accessible to us. They can say they're accessible, but until they tell us when and where we can view them, we have not completed automatic discovery.

And I think that it's very important for the Court to know from the government today, before it sets any further dates, when those 2,000 items will actually be shown to us.

MS. CLARKE: I suppose it's my southern roots that made me substantially too slow to get to those points, and I thank you very much.

Your Honor, we also need to discuss with the Court a production of *Jencks* material date.

THE COURT: Okay. Let me reach the subject of experts. My inclination at this point is to defer on timing expert disclosure because until some -- perhaps even, I think, as Ms. Clarke was saying, until some of the other discovery issues are resolved, decisions about -- reliable decisions about experts may not be in the works.

I did want to discuss in general terms, apart from whatever the dates are, whether the disclosures should be alternating or simultaneous because your proposals differ on that. I think it's not realistic to have it only simultaneous,

although in some cases, civil cases, for example, where there are experts, both parties might disclose their first round and then have response experts, or responses to others and perhaps additional.

But I just -- since you differed on that, I wanted to hear from you as to your views.

MR. CHAKRAVARTY: So this case is different than the typical criminal case in that it's very likely that as part of the penalty phase of the trial that the defense intends to call a number of experts who are not presently, and may not be for several months, apparent to the government.

The government's case for liability is very straightforward. The types of experts that we will call are likely similar -- going to be similarly straightforward. So the staggering of expert disclosure dates, as in the typical case where a defense expert is called to respond to the government's theory of the case and/or to present a defense strategy, is kind of on its ear, because we don't know what the defense mitigation strategy is, or will be, as supported by expert testimony, and it's not exclusively related to a -- what is otherwise a legal defense, you know, "He didn't do it."

The exact nature and the tenor of that disclosure by the defense is going to be crucial to the government to find out -- to be able to find a rebuttal expert, to be able to do research on that particular expert, and to challenge whether,

in fact, that that is a legitimate mitigation strategy under -- as a non-statutory factor.

THE COURT: I guess I'm not following you. It sounds like you're arguing for a staggered schedule.

MR. CHAKRAVARTY: Well, I'm not sure that the Court would order the defense to have an earlier disclosure than the government just because it's so unconventional, but in many ways we think that that's where the equities lie, your Honor.

THE COURT: Well, I think it also may be complicated by the different interests and strategies in the two phases of the trial, and so it may be that -- and this is to air the possibilities. It may be that the first disclosures are only liability or guilt-phase disclosures, and there will be a second, later disclosure for a penalty phase.

MR. CHAKRAVARTY: I think frankly, your Honor, the government would be disadvantaged by that strategy, the thought being that in the few months that we'll have before trial and we're preparing our responses to and preparing our liability case, we have to at the same time, both as early as jury selection and throughout the entire liability phase of trial, the -- it's -- you know, let's not kid ourselves that the issue here is going to be the penalty.

And if we are not transparent in understanding for the liability phase what the defense strategy is going to be and, similarly, what our strategy ought to be, then we will be at

the disadvantage when beginning a liability phase we'll have a much compressed time schedule in order to prepare for what may, at that time, be a very novel litigation strategy that we could not have anticipated during the month or so that we're actively engaged in the liability phase.

THE COURT: Okay. Ms. Clarke?

MS. CLARKE: Well, I think that the staggered disclosure is about the only way to go. I mean, we are responsive to the government, and to say that there should be a simultaneous exchange, we have no way of knowing what experts they intend to call. They held back. You know, we can't get forensic reports on computers, you know? So we have no real good idea what they're putting on. So their expert disclosure for the guilt phase and then our expert disclosure for the guilt phase would work very well.

You know, frankly, I don't see -- I mean, you know, I understand the Court's desire to move this case along, but I don't see us identifying experts by the time the -- for the mitigation phase by the time the Court has set the trial date.

THE COURT: Okay. I understand your view. I took it into account.

Let me ask -- well, I guess one thing Mr. Chakravarty said that struck me about separating the potential two phases of the trial is that it's the same jury and it probably would be necessary to have all disclosures before the selection of

the jury. We'll take that into account.

Anyway, I wanted to begin the discussion of that. As I say, I'm not going to set dates for that at this point. We'll monitor proceedings.

What else? It sounded like -- it looked like you were about to rise to say something. No?

Well, we will probably -- as I think the parties know, the defense has filed a supplemental memorandum on the SAM's issue just yesterday, and so that the government will be responding. I don't know that -- because it was just submitted yesterday, whether the clerical attention to it has completed or not. There's a motion to seal it. The full supplemental filing will be sealed but there will be a redacted version which the defense very appropriately presented for inclusion in the public record.

So there will be a response to that in the usual course. I expect we'll have a hearing on that. At some time that will be set up.

Anything else?

MR. CHAKRAVARTY: Just, I'd ask for exclusion of time, your Honor. Given the firm date is the June 11th date, I suppose --

THE COURT: Yes. That's why, in part, I set that as a status date, even though I expect we'll be seeing each other. I presume there's no objection to the exclusion of time under

the Speedy Trial Act?

MS. CLARKE: Not at all, your Honor.

Just a small request. Could we move that June 11th date one week?

THE COURT: To the 18th?

MS. CLARKE: Either forward or back.

THE COURT: Okay. The 18th?

MS. CLARKE: That would be fine.

THE COURT: So we'll do that for both -- that was the date that served two purposes, which was any venue motion and a status conference.

MS. CLARKE: Thank you, your Honor.

THE COURT: The 18th is fine.

MS. CLARKE: I don't know, could the Court assist us in determining when these 2,000 items might be available for our review?

THE COURT: Well --

MR. CHAKRAVARTY: Yeah, we're aware of the exigency of our interest in making it available as quickly as possible, whether it be down in Quantico, Virginia, or up here. Our preference is obviously to do it up here. We simply don't have --

THE COURT: Can you give a list or a catalog of them so that at least they can assess how much commonality there is? I mean --

MR. CHAKRAVARTY: Yes. Yes.

THE COURT: -- are these two things of which there are a thousand copies each, or are they a thousand different things and so on? It may --

MR. CHAKRAVARTY: I think that has been done, but we'll further narrow that and communicate with Quantico as well to ensure that we make it --

THE COURT: If you can supply --

MS. CLARKE: I don't believe that's been done.

THE COURT: Yeah. If you could supply a roster or a list of them, there may be some that they could tell by the list they're not interested in seeing.

MR. CHAKRAVARTY: It may not have already been provided, although -- but I think that the process to do that, anticipating that that is going to be the issue so we can identify with the --

THE COURT: Is there any impediment to that?

MR. CHAKRAVARTY: No. No. That's my point. I think that process -- anticipating once we learned that this material was down there and cataloging what it was, the FBI has been diligently identifying what is down in Quantico and we're preparing and we can provide --

THE COURT: I mean, I assume -- you referred to chain of custody. I assume somebody knows what they have, right?

MR. CHAKRAVARTY: Yes.

THE COURT: In other words, somebody has made a list of it. So can you get that to them by the end of the week?

MR. CHAKRAVARTY: I think that's reasonable, your Honor.

MS. CLARKE: Your Honor, you have a black robe and it took you some time to get that answer out, so you can imagine the problems we're having.

MR. CHAKRAVARTY: Quite frankly, we weren't asked for that, your Honor. We weren't asked for a list of the items.

THE COURT: You're going to get it.

MS. CLARKE: Thank you, your Honor.

THE COURT: All right. If there's nothing else, we'll be in recess.

MR. CHAKRAVARTY: Thank you, your Honor.

THE CLERK: All rise. Court will be in recess.

(The proceedings adjourned at 10:30 a.m.)

C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSO, RMR, CRR
Official Court Reporter

Date: 2/14/14